

PATTI GOLDMAN (WSB #24426)  
AMY WILLIAMS-DERRY (WSB #28711)  
Earthjustice  
705 Second Avenue, Suite 203  
Seattle, WA 98104  
(206) 343-7340  
(206) 343-1526 [FAX]  
pgoldman@earthjustice.org  
awilliams-derry@earthjustice.org

THE HONORABLE JOHN C. COUGHENOUR

*Attorneys for Plaintiffs*

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

WASHINGTON TOXICS COALITION; ) Civ. No. C04-1998C  
NORTHWEST COALITION FOR )  
ALTERNATIVES TO PESTICIDES; )  
NATIONAL WILDLIFE FEDERATION; )  
DEFENDERS OF WILDLIFE; NATURAL ) PLAINTIFFS' MOTION TO COMPEL  
RESOURCES DEFENSE COUNCIL; ) COMPLETION OF THE  
CENTER FOR BIOLOGICAL DIVERSITY; ) ADMINISTRATIVE RECORD  
PACIFIC COAST FEDERATION OF )  
FISHERMEN'S ASSOCIATIONS; ) NOTE ON MOTION CALENDAR  
INSTITUTE FOR FISHERIES RESOURCES; ) April 22, 2005  
and HELPING OUR PENINSULA'S )  
ENVIRONMENT, )

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF )  
INTERIOR; UNITED STATES )  
DEPARTMENT OF FISH AND WILDLIFE )  
SERVICE; UNITED STATES )  
DEPARTMENT OF COMMERCE; and )  
NATIONAL MARINE FISHERIES )  
SERVICE, )

Defendants,

and

PLAINTIFFS' MOTION TO COMPEL  
COMPLETION OF THE ADMINISTRATIVE  
RECORD (C04-1998)

*Earthjustice*  
705 Second Ave., Suite 203  
Seattle, WA 98104  
(206) 343-7340

1 )  
2 CROPLIFE AMERICA, WASHINGTON )  
3 FRIENDS OF FARMS AND FORESTS, )  
4 WASHINGTON STATE POTATO )  
5 COMMISSION, NATIONAL POTATO )  
6 COUNCIL, WASHINGTON STATE FARM )  
7 BUREAU, IDAHO FARM BUREAU )  
8 FEDERATION OF WHEAT GROWERS, )  
9 WASHINGTON GOLF COURSE )  
10 SUPERINTENDENTS ASSOCIATION, HOP )  
11 GROWERS OF WASHINGTON, AND )  
12 WASHINGTON STATE HORTICULTURAL )  
13 ASSOCIATION, )  
14 )  
15 Defendant-Intervenors. )  
16 )  
17 )  
18 )  
19 )  
20 )  
21 )  
22 )  
23 )  
24 )  
25 )  
26 )

---

PLAINTIFFS' MOTION TO COMPEL  
COMPLETION OF THE ADMINISTRATIVE  
RECORD (C04-1998)

*Earthjustice*  
705 Second Ave., Suite 203  
Seattle, WA 98104  
(206) 343-7340

1 INTRODUCTION

2 This motion seeks to complete an administrative record that is so woefully inadequate it  
3 will hamper effective judicial review. This case challenges a regulation in which defendants Fish  
4 and Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”) (the “Services”)  
5 have unlawfully abdicated their Endangered Species Act (“ESA”) consultation duties by  
6 delegating to the Environmental Protection Agency (“EPA”) the authority to conduct unilateral  
7 ESA consultations, without any concurrence by the Services, for EPA pesticide registrations  
8 permitting uses that may harm endangered species. The Services promulgated the controversial  
9 regulation in conjunction with an extensive and contentious inter-agency review of EPA’s  
10 pesticide program that was spurred by years of persistent criticisms by the Services of EPA’s  
11 failure to guard against the full impacts of the pesticides to endangered species. As a predicate for  
12 the new regulation, the Services have departed from their past criticisms and approved EPA’s  
13 pesticide program.

14 Plaintiffs Washington Toxics Coalition et al. (“Toxics Coalition”) have challenged the  
15 regulation on numerous grounds, including that it deviates from the ESA’s mandates, runs counter  
16 to best available science, is based on findings that are contrary to the evidence before the agencies,  
17 and lacks the assessment of viable alternatives and the regulation’s full effects required under the  
18 National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 et seq. Despite the evidentiary  
19 and scientific underpinnings of the regulation and the challenges to it, the Services have filed an  
20 administrative record limited to the official rulemaking documents and select materials provided  
21 directly to their designated decisionmaker. They have excluded contrary evidence and the  
22 substantial scientific and legal controversy underlying the regulation reflected in the suppressed  
23 drafts, internal dialogue, meetings, and analyses that were part of the rulemaking process. Because  
24 the reviewing Court needs a full record of the evidence before the agency, not a one-sided

1 compilation of self-serving documents supporting the agencies' action, the Toxics Coalition asks  
2 the Court to compel the Services to file the full administrative record.

### 3 BACKGROUND

4 To understand what the administrative record should contain, it is helpful to review: (1)  
5 EPA's history of noncompliance with its ESA duties that provided an impetus for the rule; (2) the  
6 Services' critiques and extensive review of EPA's pesticide approval process underlying the  
7 regulation; and (3) the industry lobbying, inter-agency participation, and internal dissent.

#### 8 EPA's Widespread Violations of the ESA Spurred Litigation to Compel ESA Compliance.

9 As the federal agency that authorizes pesticide use through registration under the Federal  
10 Insecticide, Rodenticide and Fungicide Act ("FIFRA"), 7 U.S.C. §§ 136-136y, EPA has a duty to  
11 ensure, in consultation with the Services, that its registrations are "not likely to jeopardize the  
12 continued existence of any [listed] species." 16 U.S.C. § 1536(a)(2); see generally Complaint ¶¶  
13 17-29. EPA has honored this duty in the breach. As the complaint explains, EPA has initiated few  
14 consultations over the past 15 years despite finding that the pesticides may harm species, and for  
15 consultations completed in the 1980s and early 1990s, EPA has failed to implement mitigation  
16 necessary to avoid jeopardizing listed species. See id. ¶¶ 36-43.

17 Beginning in 2001, EPA's rampant ESA violations began to catch up with it. In January  
18 2001, a subset of the plaintiffs sued to compel EPA to consult on the impacts of 55 pesticides on  
19 listed salmon and steelhead. This Court ordered EPA to initiate ESA consultations:

20 Despite competent scientific evidence addressing the effects of pesticides on salmonids and  
21 their habitat, EPA has failed to initiate section 7(a)(2) consultation with respect to its  
22 pesticide registrations. . . . Such consultation is mandatory and not subject to unbridled  
23 agency discretion. The Court declares, as a matter of law, that EPA has violated section  
24 7(a)(2) of the ESA with respect to its ongoing approval of 55 pesticide active ingredients  
25 and registration of pesticides containing those active ingredients."

26 Washington Toxics Coalition v. EPA, No. C01-132C, Order at 15 (W.D. Wash. July 2, 2002).

1 EPA's noncompliance with ESA Section 7 extends far beyond salmon. Accordingly,  
2 similar cases seeking to compel EPA to consult on pesticide impacts on listed species have been  
3 brought around the country. See Complaint ¶ 49 (describing cases). The chemical industry  
4 responded to the Washington Toxics ruling and the other litigation by lobbying EPA to adopt a  
5 regulation authorizing EPA to sidestep the consultation process by making "not likely to adversely  
6 affect" determinations without obtaining the Services' concurrence, as is otherwise required, based  
7 on the risk assessments it uses to register pesticides.

8 The Inter-Agency Review of EPA's Risk Assessment Process Underlying the Regulation.

9 EPA registers pesticides based on risk assessments that model the potential risks to people,  
10 wildlife, and the environment. For years, the Services have been extremely critical of EPA's  
11 ecological risk assessments for overlooking peer-reviewed scientific literature, lacking studies on  
12 particular species, and ignoring potentially significant impacts due, for example, to sublethal  
13 effects, inert ingredients, and pesticide mixtures. Plaintiff Defenders of Wildlife attached to its  
14 comments (Admin. Record ("AR") Disk 4) numerous such critiques sent by the FWS to EPA on  
15 particular pesticides. See, e.g., Defenders Attachment 4 (June 27, 2002 FWS Letter at 3, 5,  
16 identifying data gaps in EPA's atrazine risk assessment, including on sublethal effects, inert  
17 ingredients, and food chain bioaccumulation); Attachment 1 (July 26, 2000 FWS Letter at 3-4,  
18 criticizing EPA's endosulfan risk assessment for insufficient analysis of direct, indirect, and  
19 cumulative effects); see also Decl. of Erika Schreder Exh. 14-18 (March 31, 2005) (NMFS letters  
20 identifying additional information needed for particular salmon consultations).

21 In 2000, EPA acceded to the Services' demands for an inter-agency review  
22 of EPA's risk assessment process as a prelude to this rulemaking. Goldman Decl.  
23 Exh. 1 at 1 (Nov. 28, 2000 EPA request for Services' review of EPA's risk  
24 assessment process). During this process, the Services offered EPA frequent,  
detailed critiques of EPA's risk assessment methods, consistently finding them to  
be insufficiently protective under the ESA. Examples of such critiques can be  
found in the Defenders' public comments and in records obtained by the Toxics

Coalition through a public disclosure request. See, e.g., Defenders Attachment 44 at 1-2 (May 14, 2002 FWS criticisms of EPA's attempts to account for sublethal effects, inert ingredients, and pesticide mixtures as "inadequate to accurately assess effects to listed species"); Schreder Exh. 4-5 (FWS preparatory notes for 12/3/03 meeting raising concerns about EPA's lack of data on certain species and exposure pathways); Schreder Exh. 6 (April 2004 draft NMFS letter refusing to concur in EPA's "not likely to adversely affect" findings because the 28 pesticides may have "greater than discountable or insignificant effects on listed species," and EPA's risk assessments fail to apply the best science and inadequately assess the pesticides' effects on salmon).

Ultimately, the inter-agency review led to some refinements to EPA's risk assessment process, described in EPA's "Overview of the Ecological Risk Assessment Process" (Jan. 23, 2004), which the Services approved as an essential predicate for the challenged regulation. AR Disk 1, Docs. 28-29. Accordingly, the final rule states:

The Services have carefully reviewed EPA's assessment methodologies and believe that when EPA follows its established approach to ecological risk assessment for pesticides EPA will correctly make determinations as to when a pesticide is or is not likely to adversely affect listed species or critical habitat.

69 Fed. Reg. 47,732, 47,737 (Aug. 5, 2004). The final rule makes numerous findings, based on the inter-agency review, that EPA can credibly engage in self-consultation using its risk assessments. Id. at 47,735, 47,741-42, 47,744, 47,746-47.

Despite the central role played by the inter-agency review, the record contains only the final Overview document and Services' approval of it. None of the scientific critiques or inter-agency communications have found their way into the record.

#### Other Agency Processes and Communications Excluded from the Record

By limiting the record to the official rulemaking documents, the Services have concealed the ordinary agency give-and-take and outside advocacy that is typically part of a rulemaking. Apart from official rulemaking and final documents, the record contains less than a dozen emails and memoranda leading to the final regulation. AR Disk 1, Docs. 18-19, 21-22, 30-35. These few documents reveal glimpses of robust debate and lingering doubt otherwise missing from the

1 administrative record.

2 For example, the chemical industry's lobbying extended beyond formal comments to  
3 meetings with agency staff. The only such meetings reflected in the record are those with the  
4 designated decisionmaker, Assistant Interior Secretary Julie MacDonald. Though sparse, this  
5 portion of the record contains an industry email complaining that ecological risk assessments will  
6 shut down if made too protective of species (Disk 1, Doc. 31), an industry critique of EPA's risk  
7 assessments (*id.*), and several industry briefings of the Assistant Secretary on EPA's risk  
8 assessments (Disk 1, Docs. 32-34). These documents refer to other meetings that are not  
9 memorialized in the record. See Disk 1, Doc. 32, at 2.

10 Another email to the Assistant Secretary refers to Council on Environmental Quality  
11 ("CEQ") meetings at which the Services, EPA, CEQ, and other agencies discussed the rulemaking,  
12 including whether to treat comments on EPA's pesticide consultations as part of the administrative  
13 record. Disk 1, Doc. 18. Apart from this reference, the record is devoid of meetings at which the  
14 Services discussed this rulemaking internally or with other agencies.

15 Finally, in two documents, FWS continued to raise concerns about inadequacies in EPA's  
16 risk assessments, similar to those raised in the inter-agency review. Disk 1, Docs. 30 & 35. As the  
17 records obtained by some of the plaintiffs under public record laws substantiate, these two  
18 documents embodying FWS concerns are just the tip of the iceberg.

19 Soon after filing this lawsuit, the Toxics Coalition conveyed to the Services their  
20 expectation that the record would include the full agency communications, analysis, and exchanges  
21 leading to the challenged rule, as is typical for a record for a challenge to an agency regulation.  
22 Goldman Decl. Exh. 2, at 1 (March 22, 2005 letter to Services' counsel). The Services decided  
23 instead to limit the record to the official rulemaking documents and specific documents actually  
24 reviewed by the designated decisionmaker. *Id.* In response to the Toxics Coalition's request, the

Services have agreed to supplement the record with additional official rulemaking documents, but have refused to supply the complete administrative record, necessitating this motion. *Id.*, Exh. 3 (Services' March 29, 2005 response).<sup>1</sup>

## ARGUMENT

### THE SERVICES HAVE AN OBLIGATION TO FILE THE COMPLETE ADMINISTRATIVE RECORD, NOT SIMPLY THE OFFICIAL RULEMAKING DOCUMENTS AND RECORDS REVIEWED BY THE DECISIONMAKER.

The Services have submitted a skeletal, one-sided record that omits entire chapters of the rulemaking process and the agency reviews and analyses leading to the final rule. While dubbed the "administrative record" by the Services, what has been filed thus far falls far short of what constitutes an administrative record.

This case is brought under the Administrative Procedure Act ("APA") under which a court may hold unlawful and set aside final agency action, findings, and conclusions that are arbitrary, capricious, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). Judicial review of APA claims is conducted on the basis of the administrative record that was before the agency. *See, e.g., FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976). The administrative record must be "the whole record" that was actually before the agency, as opposed to a carefully culled record compiled by agency lawyers to defend the final result in subsequent litigation. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971).

As the Ninth Circuit has emphasized repeatedly:

The "whole record" includes everything that was before the agency pertaining to the merits of its decision. An incomplete record must be viewed as a "fictional account of the actual decision-making process." . . . If the record is not complete, then the requirement that the agency decision be supported by "the record" becomes almost

---

<sup>1</sup> The Services admit that EPA's rulemaking records need to be added to the record because EPA assumed primary responsibility for receiving public comments and maintaining the public docket early in the rulemaking. *Id.* at 2; *see* 68 Fed. Reg. 3786 (Jan. 24, 2003). If the Court compels the Services to complete the record, the Services should be required to include documents in EPA's possession from the time it oversaw the rulemaking process that are comparable to the Services' records added to the record.



1           meaningless.

2   Portland Audubon Soc’y v. Endangered Species Comm., 984 F.2d 1534, 1548 (9<sup>th</sup> Cir. 1993)  
3 (citations omitted). According to the Ninth Circuit, “[t]he ‘whole’ administrative record, therefore,  
4 consists of all documents and materials directly or indirectly considered by agency decisionmakers  
5 and includes evidence contrary to the agency’s position.” Thompson v. Dep’t of Labor, 885 F.2d  
6 551, 555 (9<sup>th</sup> Cir. 1989) (citations omitted).

7           The Services take the position that this case can be reviewed based on a record devoid of  
8 drafts, internal reviews and critiques, the inter-agency review, and dissent from agency scientists.  
9 In essence, the Services want this Court to look only at the decisions made and stated rationale,  
10 rather than flaws in the decisionmaking process. This position is at odds with settled  
11 administrative law. At its core, the arbitrary and capricious standard “focuses on the rationality of  
12 the decision making process rather than the rationality of the actual decision.” Olenhouse v.  
13 Commodity Credit Corp., 42 F.3d 1560, 1575 (10<sup>th</sup> Cir. 1994). Accordingly, the record must  
14 necessarily include drafts, internal communications, notes, and pertinent studies before the  
15 agencies. Miami Nation of Indians v. Babbitt, 979 F. Supp. 771, 776 (N.D. Ind. 1996).

16           First, as to drafts, there is no question that drafts of documents, internal reviews, and  
17 critical comments belong in the administrative record. Ohio Valley Envtl. Coalition v. Whitman,  
18 2003 WL 43377, \*5 (S.D.W.Va. 2003) (“the administrative process is precisely one of initial  
19 proposals, comments, compromise, revisions and final drafts . . . the materials produced in this  
20 process are typically part of the administrative record”); Miami Nation of Indians, 979 F. Supp. at  
21 776 (ordering inclusion of drafts, notes, comments, and internal communications in record);  
22 see also Southwest Ctr. for Biological Diversity v. Bureau of Reclamation, 143 F.3d 515, 522-3  
23 (9<sup>th</sup> Cir. 1998) (court reviewed drafts included in administrative record in ruling on summary  
24 judgment); Greenpeace v. NMFS, 55 F. Supp.2d. 1248, 1265 (W.D. Wash. 1999) (court

1 considered draft in evaluating ESA compliance). The Schreder Declaration includes numerous  
2 drafts and analyses excluded from the record. See, e.g., Schreder Decl. Exh. 7 (hand notations on  
3 draft Overview document); id. Exhs. 8-13 (NMFS and FWS critiques of EPA’s draft Overview and  
4 the Services’ review of it). The sparse record filed here stands in sharp contrast to the  
5 administrative record filed in a comparable challenge to the Services’ self-consultation regulation  
6 for the national fire plan, which contains approximately 500-600 pages of internal notes, drafts,  
7 edits, comments, and emails generated during development of that rule. See Goldman Decl. Exh.  
8 2 & 4.<sup>2</sup>

9 Second, the Services cannot properly limit the administrative record to the documents  
10 actually provided to or considered by the designated decisionmaker. Courts have consistently  
11 rejected arguments that documents generated during the decisionmaking process can be excluded  
12 from the record because the agency did not ultimately “rely” on such information. See Fund for  
13 Animals v. Williams, 245 F. Supp.2d 49, 55 (D.D.C. 2003); see Miami Nation of Indians, 979 F.  
14 Supp. at 777 (“a document need not literally pass before the eyes of the final agency decision  
15 maker to be considered part of the administrative record”) (quoting Clairton Sportsmen’s Club v.  
16 Pennsylvania Turnpike Comm’n, 882 F. Supp. 455, 464 (W.D. Pa. 1995)); Env’tl. Defense Fund v.  
17 Blum, 458 F. Supp. 650, 661 (D.D.C. 1978) (improper “to exclude from consideration pertinent  
18 material submitted as an integral part of the rulemaking process or otherwise located in EPA’s own  
19 files” even if agency did not rely on it).

---

21 <sup>2</sup>The Services have asserted that any agency deliberations are outside the proper confines of the record. Goldman  
22 Decl. Exh. 2 (March 29, 2005 Maysonnett Letter at 2 n.2). If accepted, this position would eradicate decades of  
23 administrative law defining the administrative record to include such deliberations. Typically, the agencies submit a  
24 privilege log identifying specific documents withheld based on privileges, including the deliberative process privilege  
in those narrow instances where it has not been overridden by the Court’s need to review agency deliberations to  
embark on APA review of the agency decision. See Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 861-  
62 (D.C. Cir. 1980) (agency bears burden of proving privilege which can be overridden by litigation needs); accord  
Miami Nation of Indians, 979 F. Supp. at 778-79 (although drafts and internal deliberations are generally part of the  
administrative record, agency head may prove deliberative process privilege applies to discrete documents upon a

1 The record submitted by the Services is woefully inadequate because it consists of only the  
2 official rulemaking records and a handful of documents reviewed by the FWS decisionmaker.<sup>3</sup>  
3 The agencies' attorneys cannot pick and choose what will be included in the record. "Rather . . .  
4 the Court must look to all the evidence that was before the decision-making body" at the time it  
5 made its decision. Exxon Corp. v. Dep't of Energy, 91 F.R.D. 26, 32-33 (N.D. Tex. 1981), citing  
6 Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88 (1951).

7 THE COURT CANNOT DECIDE THE APA CLAIMS PRESENTED WITHOUT THE  
8 FULL RECORD OF THE EVIDENCE BEFORE THE AGENCY.

9 For a reviewing court to determine whether an agency's action is the product of rational  
10 decisionmaking and is based on substantial evidence, it is essential that the administrative record  
11 consist of the "whole record" created during the decisionmaking process. Citizens to Preserve  
12 Overton Park, 401 U.S. at 420. How the agency dealt with evidence that runs contrary to the  
13 decision is critical in APA arbitrary and capricious review. Accordingly, the agencies cannot  
14 exclude from the record documents generated or received during the rulemaking or related  
15 processes that undercut the findings and decisions made. See Thompson, 885 F.2d at 555.

16 The instant case challenges several findings that form the predicate for the regulation as  
17 being contrary to the best available science and the evidence before the agencies. E.g., Complaint,  
18 2<sup>nd</sup> & 3<sup>rd</sup> Counts. Departing from their past criticisms, the regulation states:

19 The Services have carefully reviewed EPA's assessment methodologies and believe that  
20 when EPA follows its established approach to ecological risk assessment for pesticides  
21 EPA will correctly make determinations as to when a pesticide is or is not likely to  
22 adversely affect listed species or critical habitat.

23 69 Fed. Reg. at 47,737. The regulation repeatedly finds, based on the inter-agency scientific  
24 review of EPA's process, that EPA's risk assessments embody the best available science, will

25 particularized showing that interests in confidentiality outweigh need for document for judicial review).  
26 <sup>3</sup> Without explanation, the record omits comparable documents reviewed by the NMFS decisionmaker.

1 produce effects determinations consistent with what the Services would produce, and contain  
2 adequate information for consultation. Id. at 47,735, 47,741-42, 47,744, 47,746-47. These  
3 findings form the essential foundation for the regulation’s delegation of self-consultation authority  
4 to EPA.

5 This case challenges the evidentiary basis for these findings. For example, the complaint  
6 avers at ¶ 117 that:

7 The Services recognize that EPA has failed to correct many pitfalls in its assessments, yet  
8 they are now willing to defer to EPA’s use of its “best professional judgment” in deciding  
9 how to use peer-reviewed scientific literature, surface water modeling, and evidence of  
10 effects that cannot be quantified and incorporated into a quantitative risk assessment. . . .  
11 EPA’s “best professional judgment” cannot be equated with the best available science  
12 particularly given its poor track record, the importance of the gaps in its assessments, the  
13 Services’ past critiques, and the lack of meaningful standards constraining how EPA will  
14 exercise such discretion.

15 See, e.g., id. ¶ 108 (the regulations “prescribe no sidebars to guarantee that EPA will employ the  
16 best science in exercising this professional judgment and in addressing data gaps and  
17 uncertainty”); and ¶ 133 (Services’ rationale for weakening their oversight “runs counter to the  
18 best science, the record before the agency, and the conclusions reached by the Services both in the  
19 rulemaking process and previously in evaluations of EPA ecological risk assessments of  
20 pesticides.”)

21 In order for the Court to review the Toxics Coalition’s challenge to these findings as  
22 running counter to the evidence before the agency, the record must contain the contrary evidence  
23 that was before the agency, including the full inter-agency risk assessment review and uncensored  
24 internal dissent. The final rule described the inter-agency risk assessment review, which generated  
25 extensive documents excluded from the record. The Toxics Coalition has submitted examples of  
26 such omitted documents to illustrate the nature of the suppressed material. See, e.g., Schreder  
Decl. Exh. 13, at 1 (June 5, 2003 FWS review of draft Overview document stating “given data

1 gaps, uncertainty, and process limitations[,] the assessment process will need to be substantially  
2 modified to ensure EPA determinations . . . are consistent with ESA”). Inexplicably, the record  
3 excludes documents from the inter-agency review and the internal and scientific debates over  
4 whether EPA’s modified risk assessments meet the ESA’s mandate to use the best available  
5 science in ensuring listed species are protected. 16 U.S.C. § 1536(a)(2).

6 The Services also stripped from the record any agency documents pertaining to their  
7 compliance with NEPA, apart from their final environmental assessment and finding of no  
8 significant impact. Disk 1, Docs. 4-5. The Toxics Coalition challenges the Services’ failure to  
9 disclose the full impacts of the rule, as well as their failure to consider viable alternatives, such as  
10 those floated in the advance notice of proposed rulemaking. See Complaint ¶¶ 142-147. The  
11 complaint also asserts that the Services had to prepare an environmental impact statement due to  
12 the intense controversy, scientific uncertainties, and precedential nature of the regulation. Id. ¶¶  
13 148-151. Yet the record is devoid of the internal discussions that reveal the impacts of the rule,  
14 assessments of alternatives, the scientific uncertainties in EPA’s risk assessments, and the  
15 controversial nature of the self-consultation scheme. The Services cannot properly exclude  
16 dissenting views from the record in order to mask the regulation’s impacts and prevent the full  
17 disclosure that NEPA requires.

18 The Court can decide the claims presented only upon review of the full body of information  
19 before the agencies: “Even though an agency decision may have been supported by substantial  
20 evidence, where other evidence in the record detracts from that relied upon by the agency we may  
21 properly find that the agency rule was arbitrary and capricious.” American Tunaboat Ass’n v.  
22 Baldrige, 738 F.2d 1013, 1016 (9<sup>th</sup> Cir. 1984). Indeed, “[r]eview of less than the full  
23 administrative record might allow a party to withhold evidence unfavorable to its case. . . .” Walter  
24 O. Boswell Memorial Hosp. v. Heckler, 749 F.2d 788, 792 (D.C. Cir. 1984). One court has even

1 found that the government's failure to include contrary evidence in the administrative record  
2 constituted bad faith. See Maritime Management Inc. v. United States, 242 F.3d 1326, 1335 &  
3 n.14 (11<sup>th</sup> Cir. 2001). However characterized, the Services have failed to file the whole  
4 administrative record of this rulemaking and should be ordered to do so.

### 5 CONCLUSION

6 Because the Services have failed to file a complete record, the Toxics Coalition  
7 respectfully requests that the Court compel them to produce a complete administrative record  
8 within 30 days. The Toxics Coalition also requests leave for the parties to present a new summary  
9 judgment briefing schedule for the Court's approval, because it will not be possible for the Toxics  
10 Coalition to review the substantial number of documents omitted from the record and prepare such  
11 a motion prior to the current May 27, 2005 due date.

12 Respectfully submitted this 1<sup>st</sup> day of April 2005.

13  
14 /s/ Patti Goldman  
15 PATTI GOLDMAN (WSB #24426)  
16 AMY WILLIAMS-DERRY (WSB #28711)  
17 Earthjustice  
18 705 Second Avenue, Suite 203  
19 Seattle, WA 98104  
20 (206) 343-7340  
21 (206) 343-1526 [FAX]  
22 pgoldman@earthjustice.org  
23 awilliams-derry@earthjustice.org

24 *Attorneys for Plaintiffs*

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

On April 1, 2005, I served a true and correct copy of the following documents on the parties listed below:

1. PLAINTIFFS' MOTION TO COMPEL COMPLETION OF THE ADMINISTRATIVE RECORD;
2. DECLARATION OF PATTI GOLDMAN;
3. DECLARATION OF ERIKA SCHREDER;
4. PROPOSED ORDER ON PLAINTIFFS MOTION TO COMPEL.

Jean E. Willams, Section Chief  
Seth M. Barsky, Assistant Chief  
James A Maysonett, Trial Attorney  
US Department of Justice  
Environment & Natural Resources Division  
Wildlife & Marine Resources Section  
Benjamin Franklin Station PO Box 7369  
Washington DC 20044-7369  
Telephone: (202) 305-0216  
Fax No: (202) 305-0275  
E-Mail: james.a.maysonett@usdoj.gov  
*Attorneys for Federal Defendants*

- ☐ via facsimile
- ☐ via overnight courier
- ☐ via first-class U.S. mail
- ☐ via hand delivery
- ☒ via electronic service by Clerk

J. Michael Klise  
Crowell & Moring  
1001 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004-2595  
Phone: 202-624-2629  
Fax No. 202-628-5116  
E-mail: jmklise@crowell.com

- ☐ via facsimile
- ☐ via overnight courier
- ☐ via first-class U.S. mail
- ☐ via hand delivery
- ☒ via electronic service by Clerk

J. J. Leary, Jr.  
Leary Franke Droppert  
1500 - 4<sup>th</sup> Avenue, Suite 600  
Seattle, WA 98101  
Phone: 206-343-8835  
Fax No. 206-343-8895  
E-Mail: jjleary@lfdlaw.com

- ☐ via facsimile
- ☐ via overnight courier
- ☐ via first-class U.S. mail
- ☐ via hand delivery
- ☒ via electronic service by Clerk

1 *Attorneys for Defendant-Intervenor*

2  
3  
4 RUSSELL C. BROOKS (WSB #29811)

Pacific Legal Foundation

5 10940 NE 33<sup>rd</sup> Place, Suite 109

Bellevue, WA 98004

6 (425) 576-0484

(425) 576-9565

7 rb@pacificlegal.org

*Attorneys for Defendant-Intervenors*

- ☐ via facsimile  
☐ via overnight courier  
☐ via first-class U.S. mail  
☐ via hand delivery  
☒ via electronic service by Clerk

8  
9 I, Sandra Wagner, declare under penalty of perjury that the foregoing is true and correct.

10 Executed this 1<sup>st</sup> day of April, 2005, at Seattle, Washington.

11  
12   
13 Sandra Wagner